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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Respondent,

Vs

ROBERT WAGNER RHALL, III,

Appellant,

**Supreme Court Case No. 39950-2012
DISTRICT COURT NO. CR 11 2411**

OPENING BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF JEROME**

**HONORABLE JOHN BUTLER
District Judge**

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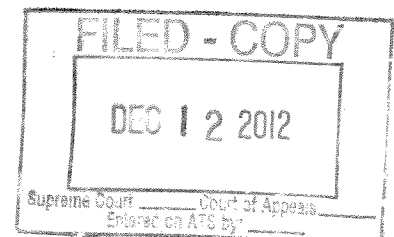


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	i-ii
COURSE OF THE PROCEEDINGS	1
STATEMENT OF THE FACTS	1- 5
ARGUMENT.....	6-17
I. THE CUED WELL-TRAINED DRUG DOG IS THE FUNCTIONAL EQUIVALENT OF THE GENERAL WRIT OF ASSISTANCE	PAGE 6
II. KENZO FAILED TO EXECUTE A SCIENTIFICALLY VALID SEARCH ON DEFENDANT’S TRUCK	PAGE 10
III. KENZO’S LACK OF INTEREST IN DEFENDANT’S TRUCK AND THE NEED TO CUE HIM TO ALERT DEMONSTRATES THE ABSENCE OF ANY TARGET ODOR OF CONTROLLED SUBSTANCES	PAGE 12
IV. THE STATE/PROSECUTION FAILED TO PROVE THE EXISTENCE OF PROBABLE CAUSE TO SEARCH DEFENDANT’S TRUCK THROUGH ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCES	PAGE 14
CONCLUSION.....	PAGE 17
CERTIFICATE OF DELIVERY.....	PAGE 18

TABLE OF AUTHORITIES

<u>STATE CASES</u>	<u>Page</u>
CALIFORNIA	
<i>California v. White</i> , 20089 WL 3111677 (Ct. App. 2009)	7
FLORIDA	
<i>Matheson v. State</i> , 870 So. 2d 8	7
<i>Harris v. State of Florida</i> , 71 So. 3d 756, 268	7
OHIO	
<i>Ohio v. Nguyen</i> , 157 Ohio App.3d 482, 811 N.E.2d 1180, 1195, n.109 (Ct.App. 2004)	7
<u>FEDERAL</u>	
<i>Stone v. Powell</i> , 428 U.S. 465 (1976).	17
U.S. v. \$80,760 in U.S. Currency, 781 F. Supp. 462, 478, n.36 (N.D. Tex. 1991), citing <i>U.S. v. Trayer</i> , 898 F.2d 805 (D.C.Cir. 1990)	7
<u>U.S. SUPREME COURT</u>	
<i>California v. Carney</i> , 471 U.S. 386, 390-92, 105 S.Ct. 2066, 2068-70, 85 L.Ed.2d 406, 412-14 (1985)	14
<i>Carroll v. United States</i> , 267 U.S. 132, 45 S.Ct.280, 69 L.Ed. 543 (1925)	14
<i>Illinois v. Gates</i> , 462 U.S. 213, 238 (1983)	15
<i>Maryland v. Pringle</i> , 540 U.S. 366, 371 (2003)	16, 17
<i>United States v. Arvizu</i> , 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740, 750 (2002)	15,16
<i>United States v. Grubbs</i> , 547 U.S. 90, 95 (2006)	15
<i>United States v. Ross</i> , 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982)	14
<i>Wyoming v. Houghton</i> , 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)	14, 15

IDAHO

<i>State v. Bottelson</i> , 102 Idaho 90, 93, 625 P.2d 1093, 1096 (1981)	14
<i>State v Braendele</i> , 134 Idaho 173 at 177, 997 P.2d 634 (2000)	15
<i>State v. Brumfield</i> , 136 Idaho 913, 42 P.3d 706(2002)	16
<i>State v. Buti</i> , 131 Idaho 793, 800, 964 P.2d 660, 667 (1998)	14
<i>State v. Gallegos</i> , 120 Idaho 894, 898, 821 P.2d 949, 953 (1991)	14
<i>State v. Holcomb</i> , 128 Idaho 296, 302, 912 P.2d 664, 670 (Ct.App.1995)	14
<i>State v Munoz</i> , 149 Idaho 121 at 127, 233 P.3d 52 (Idaho 2010)	16
<i>State v Myers</i> , 118 Idaho 608, 613, 798 P.2d 453, 458 (Ct.App.1990)	16
<i>State v. Pabillore</i> , 133 Idaho 650,654, 991 P.2d 375, 379 (App.1999)	15
<i>State v. Parkinson</i> , 135Idaho 357, 362, 17 P.3d 301, 306 (Ct.App. 2000)	15
<i>State v. Tucker</i> , 132 Idaho 841, 842, 979 P.2d 1199, 1200 (1999)	14
<i>State v Yeaumans</i> , 144 Idaho 871 at 876, 172 P.3d 1146 (Ct. App. 2007)	16

ARTICLES

writ of assistance. “Webster’s Encyclopedic Unabridged Dictionary”. Thunder Bay Press. 2001. Pg. 2193 Col. 3.)	6
“Writ of Assistance”, Wikipedia Online Encyclopedia. 27 Nov. 12	6
Robert C. Bird, “An Examination of the Training and Reliability of the Narcotics Detection Dog”, 85 Ky. L.J. 405, 408-09 (1997)	7
Lewis R. Katz & Aaron P. Golembiewski, "Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs", 85 Neb. L. Rev. 735, at 762 (2007)	7, 8
Jeffrey S. Weiner & Kimberly Homan, “Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs”, The Champion, April 2006 at 13	8, 9

COURSE OF THE PROCEEDINGS

Appellant/Defendant was arrested April 19, 2011. (Clk. Rec. Pg. 10-12) He had his initial appearance on April 20, 2011, when present defense council entered his appearance. (Clk. Rec. Pg. 14+18) Defendant posted bond after initial and has remained free of incarceration since. Preliminary hearing was held June 16, 2011 before Magistrate Borresen. Preliminary hearing resulted in Appellant/Defendant being bound over for Jury Trial on four counts. (Clk. Rec. Pg. 51-59) He pled not guilty to all four counts before District Judge John Butler July 11, 2011. (Clk. Rec. Pgs. 61-65 and 70-72) Hearing upon a Suppression Motion of Defendant was conducted on August 30 and 31st of 2011. (Clk. Rec. Pgs. 79-82 and 95-102 and 105-110) Judge Butler denied Defendant's Suppression Motion by Memorandum Ruling on September 7, 2011. (Clk. Rec. Pgs. 111-133) Defendant entered a conditional plea of guilty reserving his right to appeal the trial courts denial of his Suppression Motion on December 5, 2011. (Clk. Rec. Pgs. 150-151 and 153-154 and 157-158) He was sentenced upon the conditional plea of guilty to Felony Possession of Marijuana over 3 Oz. on February 6, 2012. (Clk. Rec. Pgs. 163-173) Notice of Appeal was filed March 15, 2012, giving rise to the present appeal. (Clk. Rec. Pgs. 183-185)

STATEMENT OF THE FACTS

On April 19, 2011, the Defendant Robert Rhall was returning to his home in Humboldt County, California from Grand Targhee, Idaho, by way of U.S. Interstate 84. As he traveled through Jerome County he was stopped for speeding at approximately 83 mph in a 75 mph maximum zone by Idaho State Patrol Sgt. Richard Garcia. While asking for Defendant's driver's license, registration, and proof of insurance, Garcia was of the opinion that he smelled a strong odor of "raw" marijuana (Supp. Mot. Tr. Pg.90 Ln21-22) Garcia relied upon his experience and training in forming this opinion. He characterized "raw" marijuana as unsmoked and still in the form of "buds and leafy stems" (Supp. Mot. Tr. Pg11Ln4-20) Garcia communicated his opinion that he smelled "marijuana" to Defendant. (Supp. Mot. Pg16 Ln10-11) Rhall admitted to having

a "marijuana card" in California but denied being then in possession of marijuana. Defendant had two dogs accompanying him in the extended cab portion of his pickup. (Supp. Mot. Tr. Pg18ln12-22) Each of these dogs had recently been sprayed by a skunk and continued to emit that aroma. (Supp. Mot. Tr. Pg.181 ln11-12+22-25 Pg.182 Ln1)

On April 19, 2011, Garcia was equipped with a portable microphone which was not functioning. Garcia denied turning his portable microphone off although he admitted to having such a capability. (Supp. Mot. Pg.29ln9-11) Garcia rather claimed the microphone was "not working" during certain periods including April 19, 2011. (Supp. Mot. Pg.29ln3-5) As a result, Garcia's recollections of conversations are all the State brought fact finders as proof of Garcia's verbal exchanges.

After removing Defendant and the two dogs from the extended passenger compartment of Defendant's truck, Garcia searched the extended passenger compartment. Garcia discovered \$1400 in small, sandwich sized zip lock baggies, Defendant's wallet containing \$250 in U.S. cash, and ashes and a stem about one half the size of Garcia's pinkie fingernail in an ashtray (he felt the ashes and stem were marijuana). (Supp. Mot. Tr. Pg18ln24 to Pg19ln23) When Sgt. Garcia learned that the rear camper shell was locked he neither forced entry nor immediately seized defendant's truck. Rather he summoned an available Jerome City Police Officer Janeece Gonzalez and her certified and operational (Supp. Mot. Tr Pg22ln23-24 and Pg50 ln20-25 Pg51 ln1-2) drug dog Kenzo.

Officer Rodrigues arrived at the scene of Defendant's stop with her dog Kenzo. Although his portable microphone was not functioning, Sgt. Garcia's in-cruiser video camera was functioning and portrays the video entirety of the Gonzalez/Kenzo free air sniff. (Def. Exh. B) This video portrays a lack of the keen interest in Defendant's truck that Kenzo should have

shown in the presence of a significant odor of drugs. (Clks Rec. 44 of 127 Report by Lawrence Myers) Secondly, the video portrays substantial cueing of Kenzo by Officer Gonzalez. (Def. Exh. B and E)

The trial court had the benefit of the education and experience of a nationally, highly relied upon expert in the area of indicator dogs, Dr. Lawrence Myers. (Def. Exh. E and Clerks Rec. Pgs. 8-34) Dr. Myers is an Associate Professor of Anatomy, Physiology and Pharmacology at Auburn University with a Master of Science in Zoology, a Ph.D. in Physiology, and a Doctor of Veterinary Medicine. Dr. Myers has been an active researcher in sensory function, behavior, health, and effectiveness of detector dog-handler teams since 1982. In 1989, he founded and directed the Institute for Biological Detection Systems, then the largest research operation, "dealing with detector dog-handler teams. Dr. Myers has been a consultant in matters of detector dog-handler teams for the State Department, Department of Defense, Department of the Treasury (US Customs, BATF, and others), U.S. Border Patrol, and the FAA. He has also been a consultant on these matters to a variety of state and local law enforcement agencies including, among others, Connecticut State Police, Madison (WI) Police Department, New York State Fire Academy, California State Police, and the Florida Department of Law Enforcement. Dr. Myers has been a lecturer for short courses for the California Narcotic Canine Association, the United States Police Canine Association, U.S. Border Patrol, International Association of Bomb Technicians and Investigators, Canine Accelerant Detection Association, National Pest Management Association, New York State Fire Academy, National Association for Search and Rescue, among others. He has authored or co-authored standards for the Canine Accelerant Detection Association, the International Forensic Institute, and the World Detector Dog

Organization. In addition, Dr. Myers has been a panelist for the National Academies of Science on detector dogs.” (Def. Exh. E)

In addition to a general lack of interest by Kenzo in Defendant’s truck, the Idaho State Patrol video (Def. Exh. B) displays multiple returns to Defendant’s truck with Kenzo at approximately 1:11:30, 1:11:54, 1:12:09, 1:12:40, 1:13:20, 1:13:37, 1:15:30 (all times are approximate as recorded by video’s elapsed time indication to left of controls); multiple yanks on Kenzo’s choke collar by his handler at approximately 1:09:00, 1:11:00, 1:13:01, 1:13:15, 1:13:45, 1:16:30 (all times are approximate as recorded by video’s elapsed time indication to left of controls); and use of a rag play toy at 1:11:54 and 1:14:14 (all times are approximate as recorded by video’s elapsed time indication to left of controls).

The use of multiple returns, the towel toy, and the jerking by the handler on Kenzo’s lead constituted cueing which rendered Kenzo’s eventual indication/alert scientifically invalid (Supp. Mot. Tr. 14 ln25 – Pg 15 ln12). As part of the basis for Dr. Myer’s opinion as to the impact of cueing on the free air sniff of Defendant’s vehicle, he relied upon an article in *Animal Cognition* published in 2011. (Def. Exh. D) This article detailed the impact of handler beliefs on detection dog indication/alerts. The overwhelming number of incorrect alerts identified across test conditions confirmed that handler beliefs affect performance. A handler’s indication of scent location can cause alerts more than the dog’s interest in a particular location. Given the social cognitive abilities of the domestic dog it is possible that even highly trained dogs might respond to subtle, unintentional handler cues. The alert/indication alleged by Officer Gonzalez is not valid in the opinion of Dr. Meyers. Dr. Myers feels Officer Gonzalez was informed by Officer Garcia’s suspicions and was influential to the point of cueing Kenzo to cause the dog to alert/indicate. (Def. Exh. E; Supp. Mot. Tr. Pg. 148 ln16 – Pg. 141-1)

The prosecution eventually claimed that Kenzo was distracted by Defendant's dogs, proximity to I-84, the need to defecate and was generally "failing to work" during the early stages of his free air sniff. (Pg. 91 ln7-25) These claims were advanced for the first time at the hearing on Defendant's Suppression Motion. Officer Gonzalez admitted that her report said, "Kenzo initially, when arriving at the back tail of the vehicle, specifically near the middle of the gate and at the lower seam near the bumper, I noticed his body began to stiffen and he was bracketing from left to right. He became focused on that portion of the vehicle." (Supp. Mot. Tr. Pg. 112 ln1-7) There is no claim of Kenzo being distracted by any external stimuli during the free air search in Officer Gonzalez's police report. (Supp. Mot Tr. Pg.111 ln22-25) At no place does Officer Gonzalez memorialize that Kenzo wasn't working early on. (Supp. Mot. Tr. Pg.117 ln2) Sgt. Garcia's police report also failed to claim Kenzo looked distracted or was failing to work early in the free air sniff. Sgt. Gonzalez's only reference to Kenzo's performance was that "I could see that the K-9's behavior changed while at the rear of the vehicle." (Def. Exh. A Pgph. 9) At preliminary hearing Sgt. Garcia testified that he observed Kenzo jump up on the back of Defendant's truck, look at the canine officer and bark. (Prelim. Tr. Pg. 21 ln5-7)

It was Dr. Myer's testimony that in his opinion that there were no distractions present at the scene of the free air sniff which should have affected Kenzo more than momentarily (Supp. Mot. Tr. Pg151 ln6 - Pg.152 ln20).

Once Officer Gonzalez told Sgt. Garcia that Kenzo had alerted/indicated on Defendant's vehicle, Garcia told Defendant the vehicle was being seized for further search. When Sgt. Garcia discovered keys to the bed topper, the search was carried out immediately at the scene of the stop (Def. Exh. B).

It was the fruits of this search of the enclosed bed of the Defendant's Dodge pickup truck that was sought to be excluded as evidence in the subject criminal action. The Defense Suppression Motion was denied by Judge Butler's Memorandum Decision. (Clk. Rec. Pg.111-134) The Trial Court's ruling that the fruits of this search of the enclosed bed of his Dodge pickup truck were admissible as evidence led to the Defendant's conditional plea of Guilty and this Appeal.

I.

THE CUED WELL TRAINED DRUG DOG IS THE FUNCTIONAL EQUIVALENT OF THE GENERAL WRIT OF ASSISTANCE.

Pre-Revolutionary War British Customs agents used general Writs of Assistance to search where and when their hunches directed them. These "royal agents" had carte blanche to seek the controlled substance of the day, untaxed molasses, upon their whim.

"Writ of Assistance: a writ issued by a superior colonial court authorizing officers of the British crown to summon aid and enter and search any premises." (writ of assistance. "Webster's Encyclopedic Unabridged Dictionary". Thunder Bay Press. 2001. Pg. 2193 Col. 3.)

The carrying out of these hunch searches, sometimes called searches upon the agents' "whim", educated early colonists to the intrusive unreasonability of these general writs and led to the Fourth Amendment's prohibition of un-particularized search warrants.

"In general, customs writs of assistance served as general search warrants that did not expire, allowing customs officials to search anywhere for smuggled goods without having to obtain a specific warrant. These writs became controversial when they were issued by courts in British America in the 1760s, especially the Province of Massachusetts Bay. Controversy over these general writs of assistance inspired the Fourth Amendment to the United States Constitution, which forbids general search warrants in the United States." ("Writ of Assistance", Wikipedia Online Encyclopedia. 27 Nov. 12)

The advent of the well-trained drug detecting dog has provided the police and important sense-enhancing investigative tool. This development is a clear attempt to employ the domestic dog's exceptional olfactory capabilities compared to the human police officer.

"The reason, of course, is the dog's keen sense of smell. A dog's nose is uniquely equipped to detect the faintest of odors. Dogs possess potentially billions of chemical receptors called olfactory cells. These receptors are located among large supports inside the dog's nose named turbinate bones. Turbinate bones form numerous cylindrical passages that allow air exposure to millions more cells than is possible with simple tubular nasal passages, such as those found in human beings. Laid out, the surface area of these cells would cover a space the area of the skin on the dog's body. In comparison, the surface area of human olfactory cells would cover no more than a postage stamp.

The effect of the dog's olfactory cells is not entirely clear. Some experts claim the result is an enhanced ability to detect minute levels of odorous material. Others assert that a canine's strength lies in its ability to discriminate among odors. Scientists supporting the discrimination theory believe that each olfactory receptor responds to a different odor; the more receptors, the greater the power to distinguish between scents. The answer most likely lies somewhere between the two opposing theories.

Little doubt exists that dogs have the ability to detect the smallest traces of odors and to perceive these scents much better than human beings." (Robert C. Bird, "An Examination of the Training and Reliability of the Narcotics Detection Dog", 85 Ky. L.J. 405, 408-09 (1997) quoting *Matheson v. Florida* (*Matheson v. State*, 870 So. 2d 8 at 15-16)

However, the domestic dog is highly susceptible to being manipulated by his handler into indicating the presence of controlled substances. This "manipulation" is referred to as "cueing".

"Cueing can be defined as the phenomenon of a handler, or someone else in a dog's presence, (California v. White, 20089 WL 3111677 (Ct. App. 2009) providing a conscious or unconscious signal to the dog that induces the dog to perform a trained behavior pattern. [(U.S. v. \$80,760 in U.S. Currency, 781 F. Supp. 462, 478, n.36 (N.D. Tex. 1991), citing U.S. v. Trayer, 898 F.2d 805 (D.C.Cm. 1990)]. Specifically with regard to drug detection dogs: Handler cues are conscious or unconscious signals given from the handler that can lead a detection dog to where the handler thinks drugs are located. (Ohio v. Nguyen, 157 Ohio App.3d 482, 811 N.E.2d 1180, 1195, n.109 (Ct.App. 2004))"

Cueing behavior by the dog's handler is recognized by the case law.

"A related problem is the possibility of handler cueing. ---Even the best of dogs, with the best-intentioned handler, can respond to subconscious cueing from the handler. If the handler believes that contraband is present, they may unwittingly cue the dog to alert regardless of the actual presence or absence of any contraband. Finally, some handlers may consciously cue their dog to alert to ratify a search they already want to conduct." *Myers*, supra, at 5 (footnote omitted). Quoting *Harris v. State of Florida*, 71 So. 3d 756, 268 at Pg. 25

And by the literature.

"Handler error affects the accuracy of a dog. The relationship between a dog and its handler is the most important element in dog sniffing, providing unlimited opportunities for the handler to influence the dog's behavior." (Lewis R. Kaiz & Aaron P. Golembiewski, "Curbing the Dog: Extending the Protection of the Fourth Amendment to Police Drug Dogs", 85 Neb. L. Rev. 735, at 762 (2007))

Cueing's existence in the performance of well-trained drug detecting dogs has been scientifically identified and must give pause to any fact finder who must determine the reliability/reasonability of any drug dog alert claimed by a police officer.

"Handler 'cueing,' in this context, is the subtle, conscious or unconscious conduct of the officer/handler during the sniff that influences the reaction of the dog and can easily prompt an 'alert' stemming from the handler's cues rather than the presence of illegal contraband. Cueing need not be verbal. It can be conveyed by various methods, many of which are very subtle. Slightly manipulating a leash, moving hands in a certain way, blocking a dog's path, holding the dog at a sniff site longer than normal (even a second or two), making certain sounds or saying words, a change in the handler's breathing pattern or tone of voice, even looking at a dog a certain way, making "facial expressions," or reaching for a particular object (such as an edible treat, ball, tug toy, or other inducement) will typically elicit a response that can easily be labeled an alert." Jeffrey S. Walzer & Kimberly Homan, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs*, *The Champion*, April 2006 at 13 (citing Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 Ky. L.J. 405, 410-15 (1997)).

This vulnerability to manipulation by the dog's handler is amplified by the training of the handler and domestic dog simultaneously as a team. This simultaneous training is the norm in Idaho. (Supp. Mot. Trans. Pg.83 through Pg.88Ln.4) Kenzo and Officer Rodriguez had been together since square one. While this bonding between handler and domestic dog may be beneficial in establishing a team identity, it also requires a full and accurate portrayal of the functioning of the team so that any claimed alert may be evaluated by a finder of fact within the totality of the circumstances. Such a full and accurate portrayal is not presented by the police agencies involved in this criminal action. The portrayal of the "free air sniff" carried out by

Officer Rodriguez and Kenzo in this case appears in the police report prepared by Officer

Rodriguez and states:

"At that time I retrieved PSD Kenzo from my patrol vehicle and conducted a free air sniff around the exterior of Robert's vehicle. Initially when PSD Kenzo arrived at the back tail gate of the vehicle, specifically near the middle of the gate and at the lower seam near the bumper, I noticed his body movement began to stiffen, he was bracketing from left to right, and he became completely focused on that portion of the vehicle. PSD Kenzo proceeded to give a final response by aggressively scratching on that specific area of the tail gate. PSD Kenzo further showed the same changes of behavior and provided two additional aggressive alerts at separate locations on the pickup. PSD Kenzo's second alert occurred on the driver's side of the pickup where the bed and the cab meet, specifically at the location of where the camper shell seam met the bed of the pickup. His third alert also took place on the driver's side of the pickup at the seam of the driver's door approximately half way up from the bottom of the door. (Supp. Mot. Tr. Pg.112Ln. 1-12 and Def. Exh. A)

This report by Kenzo's handler does not claim any "failure to work" by Kenzo or any "distractions" impacting Kenzo. The report does not document the multiple returning to Defendant's truck prior to any claimed alerts, the use of the reward toy during the search, the "correcting" of Kenzo by use of his choke collar, or the time lapse before the first claimed alert. The video of the "free air sniff" by Kenzo is devoid of sound which would portray the handler's verbalizations. This failure to fully portray or record the totality of the circumstances of the free air sniff seriously impairs the finder of facts' ability to evaluate whether the claimed alert was the product of a properly conducted free air sniff yielding the claimed alert upon which the police reasonably rely as indicating probable cause to search. Police officers seeking to employ and benefit from the drug dogs' "sui generis" ability to detect controlled substances without "rummaging" or even intrusion into the location olfactorily scrutinized by a well-trained detector dog must also admit and exclude the domestic dog's other "sui generis" characteristic: the dog's susceptibility to cueing.

"Handler "cueing," in this context, is the subtle, conscious or unconscious conduct of the officer/handler during the sniff that influences the reaction of the dog and can easily prompt an "alert" stemming from the handler's cues rather than the presence of illegal contraband. (Jeffrey S. Weiner & Kimberly Homan, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the*

Dogs, The Champion, April 2006 at 13 (citing Robert C. Bird, An Examination of the Training and Reliability of the Narcotics Detection Dog, 85 Ky. L.J. 405, 410-15 (1997)).

II.

KENZO FAILED TO EXECUTE A SCIENTIFICALLY VALID SEARCH ON DEFENDANT'S TRUCK

The trial court does not find that Kenzo was cued prior to the alert/indication or find judgement claimed by the police. Judge Butler notes the opinion of Dr. Myers that Kenzo was cued multiple times prior to a weak alert but there is never a factual ruling that Kenzo was or was not cued by his handler. This failure to find cueing is despite the unequivocal opinion of Dr. Myers that Kenzo was cued by his handler multiple times prior to providing a weak alert. Dr. Myers' opinion is overwhelmingly supported by Defendant's Exhibit B, the Idaho State Police Video of the free air sniff at 1:10:32 to 1:14:50 (Def. Exh. B.).

Both Dr. Myers report (Defendant's Exhibit E) and his testimony (Supp. Mot. Tr. Pg.128 Ln.6 to Pg.175 Ln.129) asserted that Kenzo was so repeatedly and aggressively "cued" as to render Kenzo's eventual "alert" without scientific validity. (Defendant's Exhibit E Pg. 1 Pgph. 4; Transcript of Supp. Mot. Hearing Pg.148Ln.6 to Pg.150Ln.6)

Dr. Myers finds that the multiple returns to Defendant's truck (Supp. Mot. Tr. Pg.149 Ln11-17), "corrections" by use of the lead by the handler (Supp. Mot. Tr. Pg.149 Ln.20-25), and utilization of the rag pull toy (Pg.149 Ln.2-11) function to command Kenzo to indicate/alert on Defendant's Truck during the free air sniff.

The use of all the relied upon "cueing" behaviors are portrayed by the video of Kenzo's free air sniff. Kenzo's handler intentionally, obviously, and repeatedly directs Kenzo's attention to Defendant's truck. Officer Rodriguez repeatedly "corrects" Kenzo's lack of interest in Defendant's truck and/or interest in other objects. Finally, after approximately one minute and

fifty-five seconds, Officer Rodriguez inserts Kenzo's rag pull toy into Kenzo's free air sniff. (Def. Exh. B 1:11:55) Up until utilization of this training aid, (Supp. Mot. Trans. Pg.149Ln.2-11) Kenzo has displayed a total lack of interest in Defendant's truck. The training aid is shaken toward Defendant's truck and otherwise used to establish a link between the reward toy and the truck. The handler is telling Kenzo that if he will give his final indication of the presence of drugs, he will be allowed to play with his chew toy. (Def. Exh. B., Supp. Mot. Trans. Pg.150 Ln.4-6)

Dr. Myers' assertion that even a well-trained drug dog can be cued has a solid scientific basis in the work of Dr. Lisa Lit and others. (Def. Exh. D) This peer reviewed article in Animal Cognition inquired into the social cognitive abilities of the domestic dog and determines that even the highly-trained dog can be "cued" by handler beliefs. (Exh. D Pg. 2) The study found that handler beliefs can affect an overwhelming number of false positives. (Def. Exh. D Pg. 5) More particularly, "the human scent location affects distribution of alerts more than dog interest in particular locations." (Def. Exh. D. Pg. 7)

When, as here, the dog handler has been told previous to the free air sniff that drugs are present in an area targeted for drug dog scrutiny (Supp. Mot. Tr. Pg.90 Ln20 to Pg.91 Ln1), the handler beliefs can trigger positive indication in the drug dog. Once Officer Rodriguez was told by ISP Sgt. Garcia that he smelled raw marijuana she did everything she could to cue an alert/indication from Kenzo. (Def. Exh. B 1:10:32 to 1:16:15) Kenzo's focus is predominantly on his handler and the following of her cues so as to please her. Kenzo even makes a couple of passes by the chew toy dangling from his handler's pocket.

The failure of the trial court to find that Kenzo provided a scientifically valid alert/indication of the presence of controlled substances in Defendant's truck demonstrates the

State's failure to sustain its burden to prove this search reasonable. The failure to prove a scientifically valid drug dog alert is contraindicative of the presence of controlled substance scent. This failure by a scent enhancing animal nullifies Garcia's claim that he smells raw marijuana. The State is left without probable cause under the totality of the circumstances to justify the search of Defendant's truck.

III.

KENZO'S LACK OF INTEREST IN DEFENDANT'S TRUCK AND THE NEED TO CUE HIM TO ALERT DEMONSTRATES THE ABSENCE OF ANY TARGET ODOR OF CONTROLLED SUBSTANCES

The prosecution, through its dog handler, attempted to excuse the handler's use of multiple returns to Defendant's truck, multiple corrections by use of the lead, and employment of the training aid as reasonable accepted responses to Kenzo's early "failure to work". Kenzo's handler Officer Rodriguez claimed during her Suppression Motion testimony that she had "a lot" of environmental issues, including strange dogs presence and proximity to the interstate. (Supp. Mot. Tr. Pg.91 Ln.6-24) These "environmental issues" were not listed in this Officer's police report. (Def. Exb. A) Nor was there a claim of any early failure to work or distractions. Dr. Myers refuted the ability of distractions to interfere with a drug dog's focus on containers in the presence of a target scent. (Supp. Mot. Tr. Pg.151 Ln.6 to Pg.152 Ln.29) Dr. Myers agreed that Kenzo was showing no interest in Defendant's truck early in the search (Supp. Mot. Tr. Pg.148 Ln.21-23) but it was Dr. Myers' opinion that Kenzo was working (Supp. Mot. Tr. Pg.165 Ln.25 through Pg.166 Ln2). It was in response to Kenzo's early lack of interest, although she had independent information from Officer Garcia, that Rodriguez began to cue Kenzo. There is no

interest in Defendant's truck by Kenzo until the towel reward/training tool is employed. (Def. Exh. B 1:11:55) Prior multiple return and correction are insufficient to stimulate Kenzo's interest in Defendant's truck. (Def. Exh. B 1:10:32 – 1:11:55) Only the utilization of the training aid stimulates Kenzo's interest in the truck. The free air sniff with criminal consequences is converted into a training exercise. Officer Rodriguez has abandoned her attempt to identify evidence for a criminal prosecution. At the point the training aid is employed a well-trained drug dog has shown no interest in Defendant's truck. Officer Garcia's claim that he smelled raw marijuana (the sole justification for the initial search of the cab portion of Defendant's truck) has been nullified under the totality of the circumstances.

The subsequent activities of Officer Rodriguez amount to a continuing repetition of the previously described cuing behaviors. The Trial Court finds Kenzo was "clearly distracted" (Memo Decision Pg. 19) and more importantly that Kenzo was "working". Dr. Myer agrees with both these assertions. The important distinction is the conclusion which distraction of a well-trained drug dog should require. For Judge Butler, distraction renders the drug dog insufficient to fulfill the prosecution's responsibility to sustain their burden of proof as to probable cause. (Memo Decision Pg. 19) For Dr. Myers distractibility of a "working" well-trained drug dog shows the obscurity of any target scent. (Supp. Mot. Tr. Pg.151 Ln6 to Pg.152 Ln20).

The Trial Court's ruling that Kenzo was "working" (Memo Decision Pg. 19) renders him includable in the totality of the circumstances of the search. The fact that distractibility tends to demonstrate the absence of any target scent must be weighed against Officer Garcia's claims based upon his olfactory powers and experience. The universally recognized massively superior olfactory skills possessed by the domestic dog simply trumps human olfactory impression under the totality of the circumstances.

IV.

THE STATE/PROSECUTION FAILED TO PROVE THE EXISTENCE OF PROBABLE CAUSE TO SEARCH DEFENDANT'S TRUCK THROUGH ANALYSIS OF THE TOTALITY OF THE CIRCUMSTANCES

The Fourth Amendment to the United States Constitution prohibits unreasonable searches. If a search was conducted without a warrant it is deemed to be unreasonable unless the State meets the burden of demonstrating that the search fell within a recognized exception to the warrant requirement. *State v. Tucker*, 132 Idaho 841, 842, 979 P.2d 1199, 1200 (1999); *State v. Holcomb*, 128 Idaho 296, 302, 912 P.2d 664, 670 (Cl.App.1995). The automobile exception under which a warrantless search of a vehicle is permissible if there is probable cause to believe that the vehicle contains contraband or evidence of criminal activity is long-recognized. See *Wyoming v. Houghton*, 526 U.S. 295, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999); *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct.280, 69 L.Ed. 543 (1925); *State v. Bidi*, 131 Idaho 793, 800, 964 P.2d 660, 667 (1998); *State v. Bottelton*, 102 Idaho 90, 93, 625 P.2d 1093, 1096 (1981). The automobile exception is based both upon the automobile's ready mobility, which is deemed an exigency sufficient to excuse the warrant requirement once probable cause for the search is clear, and upon the lesser expectation of privacy in an automobile as compared to the privacy interest in a home. *California v. Carney*, 471 U.S. 386, 390-92, 105 S.Ct. 2066, 2068-70, 85 L.Ed.2d 406, 412-14 (1985); *Carroll*, 267 U.S. at 153, 45 S.Ct. at 285, 69 L.Ed. at 551; *Bottelton*, supra. If probable cause justifies the search of a vehicle, then it justifies the search of every part of the vehicle and its contents which could conceal the object of the search. *Ross*, 456 U.S. at 825, 102 S.Ct. at 2173, 72 L.Ed.2d at 594. Thus, closed containers within a car can be searched pursuant to the automobile exception. *Houghton*, 526 U.S. at 299, 119 S.Ct. at 1301, 143 L.Ed.2d at 415; *State v. Gallegos*, 120 Idaho 894, 898, 821 P.2d 949, 953 (1991). The United States Supreme Court has explained that the probable cause standard depends on the totality of the circumstances. *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Probable cause exists when there is a fair

probability that contraband or evidence of a crime will be found in a particular place. *United States v. Grubbs*, 547 U.S. 90, 95 (2006) (emphasis added) (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). [P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. *Pringle*, 540 U.S. at 370-71 (alteration in original) (quoting *Gates*, 462 U.S. at 232). Probable cause is a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. *Id.* at 370 (quoting *Gates*, 462 U.S. at 231). Here, ISP Officer Garcia relied totally on his opinion that he smelled raw marijuana emitting from the cab of Defendant's truck. Officer Garcia's subsequent search of the extended truck cab yielded no raw marijuana. The search yielded fourteen hundred dollars in a computer case, two hundred and fifty dollars in defendant's wallet. Burnt ashes, which Officer Gonzalez felt might be burnt marijuana but had no articulable reasons to justify that opinion, and a twig about half the size of his pinky fingernail which he felt was marijuana, but again presented no particulars justifying such a conclusion. Prior to forcing entry into the covered truck bed of Defendant's pickup truck and/or transporting defendant's truck to ISP headquarters, Officer Garcia summoned a drug dog to do a free air sniff of the truck. Jerome City Officer Jarceee Gonzalez responded with her certified drug dog, Kenzo. As argued above, Kenzo showed no initial interest in defendant's truck despite being repeatedly cued by his handler's returning him to the truck and yanking his choke collar with the dog's leash (correction). Only when the handler interjected a training aid into the free air sniff was Officer Gonzalez able to generate a show of interest in the truck by Kenzo. It is well-established that an initial detention for one purpose (here, speeding) can disclose circumstances which justify or nullify the reasonability of any ultimate determination of probable cause. Thus, *State v. Pabillore*, 133 Idaho 650, 654, 991 P.2d 375, 379 (App.1999), held that a vehicle stop initiated for investigation of a car theft was legitimately expanded to encompass possible drug-related offenses because, in patting down one of the vehicle occupants, officers found drug paraphernalia. See also *State v. Parkinson*, 135 Idaho 357, 362, 17 P.3d 301, 306 (Ct.App. 2000) ("[A]ny routine traffic stop might turn up suspicious circumstances, which could justify an officer

asking questions unrelated to the stop.”); *State v Myers*, 118 Idaho 608, 613, 798 P.2d 453, 458

(Ct.App.1990) (same). Quoting *State v Brunfield*, 136 Idaho 913, 42 P.3d 706(2002) As

argued above, the alert/indication by a cued drug dog is not a reliable determination of the presence of a target odor of a controlled substance, but is rather a reflection of handler interest in a particular location.

The failure to provide an independent alert/indication of the presence of the target odor of a controlled substance by a certified drug dog refutes any claim of human smelling of the target odor of a controlled substance. The addition of a sense enhanced animal to the investigative team carries with it the objective possibility that the animal may contradict the opinions of the human who has uncontestably lesser olfactory skills. Such contradiction simply eliminates the earlier claim by Officer Garcia that he smelled raw marijuana. *State v Braendele*, 134 Idaho 173 at 177, 997 P.2d 634 (2000), *State v Yeaumans*, 144 Idaho 871 at 876, 172 P.3d 1146 (Ct. App. 2007)

The central error in the trial court’s weighing of the “totality of the circumstances” in this criminal action is the court’s weighing of circumstances individually not through weighing them in their totality. The Memorandum Opinion finds that Kenzo’s alert “failed to meet the State’s burden to establish probable cause” (Memo Decision Pg. 19) but there is no impact of this failure by a greatly olfactorily enhanced animal upon the greatly inferior olfactory opinions of Officer Garcia. Review must be based upon the totality of the circumstances, not upon an individual examination of each observation by the officer taken in isolation. *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 751, 151 L.Ed.2d 740, 750 (2002) , *State v Munca*, 149 Idaho 121 at 127, 233 P.3d 52 (Idaho 2010)

The easy distractibility of Kenzo early in his free air sniff demonstrated he did not smell any of his “target odors” of controlled substances. This distractibility combined with the need of his handler to cue him unequivocally demonstrated the absence of the odor of raw marijuana when these factors are properly considered in addition to Officer Garcia’s claims of olfactory information. The legal fact that free air sniffs are not required investigative tools does not mean that their findings and manner of execution can be ignored if they are employed. If a certified drug dog free air sniff is part of the totality of the circumstances of a particular investigation then it must be factored into that totality.

Weighing circumstances individually is the kind of analysis referred to as divide-and-conquer analysis disapproved of by Chief Justice Rehnquist in *United States v. Arvizu*, 534 U.S. 266 at 274 and criticized by Justice Rehnquist as depriving a defendant of "taking into account of the totality of the circumstances as our cases have understood the phrase". This failure to apply the proper legal standard in its proper rational way deprives defendant of a full and fair opportunity to litigate this federal constitutional claim pursuant to *Stone v. Powell*, 428 U.S. 465 (1976).

CONCLUSION

For the legal justifications argued above, Appellant/Defendant moves this Honorable Appellate Court to reverse the trial court's ruling denying the Appellant/Defendant's Motion to Suppress and order all fruits of the search of Appellant/Defendant's truck suppressed (excluded as evidence) in this criminal action upon withdrawal of Appellant/Defendant's conditional plea of guilty.

CERTIFICATE OF DELIVERY

I, the undersigned, hereby certify that a true and correct copy of the forgoing OPENING BRIEF
OF APPELLANT was HAND DELIVERED to the OFFICE of the CRIMINAL DIVISION OF THE
IDAHO ATTORNEY GENERAL on the 12TH day of DECEMBER, 2012.
